United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1312

B 7cc P/S

To be argued by:
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

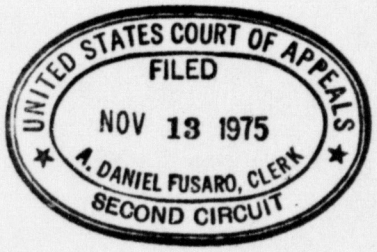
VINCENT INGENITO,

Appellant.

Docket No. 75-1312

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
VINCENT INGENITO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- VINCENT INGENITO, Appellant.	Docket No. 75-1312

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

I

Appellant relies on such decisions as United States v. Mosley, 496 F.2d 1012 (5th Cir. 1974) and United States v. Oquendo, 490 F.2d 161 (5th Cir. 1974), for the principle that entrapment is established as a matter of law when it is shown that contraband sold by an accused to a Government agent had initially been furnished by a Government informer.*

* See Appellant's Brief, p. 7-11, and cases cited therein at p. 7.

The Government attempts to distinguish these cases on their facts arguing they involve narcotics. The Government contends that weapons differ from narcotics because weapons, unlike narcotics, are not inherently illegal and that appellant's criminality arose "from the fact that he dealt in them without the required license." Government's Brief at 7. Both the narcotics crimes in Mosley and Oquendo* and the weapons charge here are crimes because the individuals involved had not obtained the licenses required in the highly regulated scheme for possession and distribution which the Government has created.

21 U.S.C. §841(a)(1), pursuant to which the defendants in Mosley and Oquendo were convicted, make the distribution of a controlled substance unlawful only for those who have not obtained an annual registration. 21 U.S.C. §822 and §823.** Paralleling this requirement, the statute under

---

* The defendants in Mosley and Oquendo were convicted of violations of 21 U.S.C. §841(a)(1) involving distribution of heroin (Mosley and Oquendo) and possession with intent to distribute (Mosley). §841(a)(1) states:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . . " (emphasis added)

** §822 states in part:

> "(a) Every person who manufactures, distributes or dispenses any controlled substance . . . shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him."

(Footnote continued on next page)

which appellant was convicted makes dealing in firearms illegal only if effectuated without the appropriate license. 18 U.S.C. §922 and §923.* Thus, for purposes of federal law, weapons and narcotics are similarly treated as contraband, and the statutory scheme by which these items are made unlawful cannot be distinguished.

The two have long been equated. As the Supreme Court stated in Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943):

> The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, aris[es] from the latters' inherent capacity for harm and from the very fact they are restricted . . .

Indeed, guns and narcotics are treated identically as contraband for search and seizure purposes under the Fourth Amendment. See United States v. Berry, 423 F.2d 142, 144 (10th Cir. 1970), United States v. Bell, 464 F.2d 667, 673-674 (2d Cir. 1972).**

(Footnote from page 2 - continued:

§822(c) does exempt certain people from the registration requirements. An agent of a registered person, a common carrier or warehouseman, acting in the normal course of their business need not register. Also, an individual who has lawfully obtained a controlled substance for his own use or for a member of his family or for a pet need not register.

§823 sets forth the registration requirements for authorized individuals.

* §923 sets forth the requirements for a license to engage in the business of dealing in firearms.

** In Bell, the defendant was convicted for a narcotics violation while the search was initially justified as one looking for weapons, gunpowder or other deleterious substances. United States v. Bell, supra, 464 at 673-4.

By analogy, further support for appellant's position that weapons and narcotics are indistinguishable is found in 49 U.S.C. §781, which deals with the unlawful transportation of contraband articles. There, the definition of contraband includes both guns and narcotics. See United States v. Berry, supra, 423 F.2d 142.

No distinction between weapons and narcotics is possible in the context of the entrapment defense raised by appellant.

II

In response to appellant's challenge to the validity of his indictment on the ground that an unauthorized person presented it, the Government asserts that Justice Department attorneys can never be "unauthorized persons" before the grand jury (Government's Brief at 17) and that only the Attorney General or his representative can challenge the actions of an attorney appearing for the Government (Government's Brief at 19). Relevant case law clearly indicates that these assertions are incorrect. United States v. Weiner, 392 F.Supp. 81, 85-86 (N.D.Ill. 1975); United States v. Huston, 28 F.2d 451 (N.D.Ohio 1928); United States v. Cohen, 273 F. 620 (D. Mass. 1921);* Presence in Grand Jury Room of Person Other than Grand Juror as Affecting Indictment, 4 A.L.R.2d 392, 420 (1949); cf. In re Patriarca, 396 F.Supp. 849, 862-863 (D.R.I. 1975).**

Thus, while asserting that a Strike Force attorney's letter of commission may define his authority broadly, the court in United States v. Weiner, supra, stated

---

*The issue here, as in Cohen, supra, is "not that the authorization was too broad, but that it was too narrow to cover the case." United States v. Morse, 292 F. 273 (S.D.N.Y. 1922).

**Patriarca, supra, involved the issue of the requisite standing necessary to challenge the issuance of a grand jury subpoena, as well as the question of whether the special attorney's letter satisfied the specificity requirements of 28 U.S.C. §515(a). In re Patriarca, supra, 396 F.Supp. at 865.

> ... that ... a "special attorney" may not exceed his authority and that a defendant may challenge any actions beyond the scope of the Attorney General's direction....
>
> Id. at 85-86.

United States v. Cohen, supra, 273 F. 620, and United States v. Huston, supra, 28 F.2d 451, make this principle clear.* In Cohen, the Special Attorney's commission empowered him to conduct grand jury proceedings. Holding that the commission did not include the authority to file informations, the court, upon the defendant's motion, dismissed the informations. Huston involved a commission which authorized the Special Attorney to proceed in two judicial districts ("the Western District of Missouri or in any judicial district where the jurisdiction thereof lies" and Minnesota). United States v. Huston, supra, 28 F.2d at 454-455. There, the court granted defendants' motion to set aside the indictment, since it had not been returned in either of the districts set forth in the commission.

Further, arguing that the Special Assistant here acted within his authority, the Government relies heavily on language in this Court's opinion in In re Grand Jury Subpoena v.

---

*United States v. Amazon Industrial Chemical Corp., 55 F.2d 254, 256-257 (D.Md. 1931), cited in the Government's Brief at 13, is distinguishable. Both commissions involved appointed special attorneys to prosecute cases already commenced, and one of the commissions specially named the offense in question. Most importantly, the issue in that case involved the propriety of delegating broad atuhority to special assistants.

Persico, Doc. No. 75-2030 (2d Cir., June 19, 1975), that the requirement that a Strike Force attorney be "specifically directed"*

> ... need not be embodied in a single written authorization, but may be implied from other writings, guidelines, practices, and oral directions transmitted through a chain of command within the Department.
>
> Id. at 4178-4179.

This language and such cases as Persico, supra, and United States v. Wrigley, 520 F.2d 362 (8th Cir. 1975),** are inapposite to the issues presented here.

Persico involved the question of the power of the Attorney General to authorize broad grants of authority to Strike Force attorneys. In that context, Persico looked beyond the letter of commission involved. After Persico, it must be conceded that the Attorney General has this power and that he

> ... may define the [Strike Force attorney's] scope of authority to suit the wishes of the United States.
>
> United States v. Weiner, supra, 392 F.Supp. at 86.

See In re Grand Jury Subpoena v. Persico, supra, slip opinion at 4156.

---

*28 U.S.C. §515(a).

**Wrigley, supra, involves the same issue presented in Persico, supra. The court in Wrigley, supra, recognized the difference between the issue which was dealt with in that case and the kind of issue raised here. United States v. Wrigley, supra, 520 F.2d at 364, n.4.

However, by listing specific statutory provisions here under which Strike Force Attorney Ritchie was authorized to proceed, the Attorney General made clear that he delegated only a portion of this broad authority and that, by appearing before the grand jury in this case, the Strike Force attorney exceeded the scope of the authority granted him by his letter of commission.

CONCLUSION

For the above-stated reasons and the reasons set forth in appellant's main brief, the judgment should be reversed and the indictment dismissed; in the alternative, the case should be remanded for a new trial.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
VINCENT INGENITO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

Certificate of Service

November 13 , 1975

I certify that a copy of this reply brief [redacted] has been mailed to the United States Attorney for the [redacted] EASTERN District of New York.

Jonathan J. Silbermann